Lau Ping Siong & Anor v Nador ak Tawi

HIGH COURT (SRI AMAN) — CIVIL APPEAL NO 12B-1 OF 2010-I (SG)
SANGAU GUNTING J
16 APRIL 2012

Civil Procedure — Pleadings — Issue not pleaded — Respondent's failure to plead cost of nursing care — Whether appellants had waived their rights to object

Damages (Personal Injury or Death) — Personal injuries — Appeal against award made — Assessment of damages — Whether sessions court judge correct in assessing quantum of damages

This was the appellant's appeal against the damages allowed by the sessions court judge ('SCJ'). The SCJ had awarded general damages of RM182,000 and special damages of RM25,498. The appellants' appeal concerned the amount of general damages pertaining to (i) the fracture of eight ribs (RM34,000), (ii) lung contusion (RM16,000), (iii) phenumohaemothorax (RM30,000) and (iv) fractures at the spine (RM100,000). The appellants submitted that the award for (i) to (iv) should be reduced to RM28,000, RM4,000, RM37,500 and RM35,000 respectively. The appellants further submitted that the cost of nursing care in the sum of RM4,200 had not been pleaded and should therefore be dismissed. The respondent maintained that the SCJ had not erred in assessing the quantum of damages.

Held, dismissing the appeal:

(1) There was no substantial reason as to why the RM34,000 allowed in respect of the fracture of eight ribs could be considered excessive. Therefore it ought to be maintained (see para 7).

(2) It had not been shown that the SCJ had acted upon wrong principle in arriving at the sums to be awarded in respect of the injuries to the lungs and liver (see para 16).

(3) Having earlier said that the respondent should be able to claim RM80,000 for the spinal injury and considering the case authority where the cervical spinal injury was RM100,000, the appellants' subsequent view that the award for the spinal injury should be RM40,000 seemed to be severely disproportionate. In any case, in the circumstances of this case the SCJ's estimate of RM100,000 for the spinal injury described was correct (see paras 24–25).

(4) Although the respondent failed to specifically plead his claim for cost of care and nursing, this had not prompted the appellants to raise the relevant objection. In fact, the appellants proceeded to cross-examine the relevant witness on her testimony of her having taken care of the respondent. In the circumstances, on the balance of probability, it would appear justified to conclude that the appellants had waived their rights to object to the award of care and nursing. Thus, the amount awarded for cost of care and nursing was to be maintained (see para 31).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap ganti rugi yang dibenarkan oleh hakim mahkamah sesyen ('HMS'). HMS telah mengawardkan ganti rugi am sebanyak RM182,000 dan ganti rugi khas sebanyak RM25,498. Rayuan perayu berkenaan jumlah ganti rugi am berkaitan (i) retak lapan tulang rusuk (RM34,000), (ii) kontusi paru-paru (RM16,000), (iii) phenumohaemothorax (RM30,000) dan (iv) fraktur di tulang belakang (RM100,000). Perayu-perayu berhujah bahawa award untuk (i) hingga (iv) masing-masing patut dikurangkan kepada RM28,000, RM4,000, RM37,500 dan RM35,000. Perayu-perayu selanjutnya berhujah bahawa kos untuk jagaan rawatan dalam jumlah RM4,200 tidak diplidkan dan patut dengan itu ditolak. Responden mengekalkan bahawa HMS tidak tersilap dalam menilai kuantum ganti rugi.

Diputuskan, menolak rayuan:

(1) Tiada alasan substansial terhadap mengapa RM34,000 yang dibenarkan berkaitan retak lapan tulang rusuk boleh dipertimbangkan sebagai berlebihan. Oleh itu ia patut dikekalkan (lihat perenggan 7).

(2) Ia tidak ditunjukkan bahawa HMS telah bertindak atas prinsip yang salah dalam mencapai jumlah yang diawardkan berkaitan kecederaan paru-paru dan hati (lihat perenggan 16).

(3) Setelah menyatakan sebelumnya bahawa responden boleh menuntut RM80,000 untuk kecederaan spina dan mempertimbangkan autoriti kes di mana kecederaan spina serviks adalah RM100,000, pandangan kemudian perayu-perayu bahawa award untuk kecederaan spina sepatutnya adalah RM40,000 seperti sangat tidak seimbang. Walau bagaimanapun, dalam keadaan kes ini anggaran HMS sebanyak RM100,000 untuk kecederaan spina disifatkan sebagai betul (lihat perenggan 24-25).

(4) Walaupun responden gagal untuk memplidkan secara spesifik tuntutannya untuk kos jagaan dan rawatan, ini tidak menyebabkan perayu untuk membangkitkan bantahan relevan. Sebenarnya, perayu meneruskan untuk memeriksa balas saksi relevan atas keterangannya setelah menjaga responden. Dalam keadaan ini, atas imbangan kebarangkalian, adalah berjustifikasi untuk memutuskan bahawa

perayu-perayu telah mengetepikan hak mereka untuk membantah award jagaan dan rawatan. Oleh itu, jumlah yang diawardkan untuk kos jagaan dan rawatan hendaklah dikekalkan (lihat perenggan 31).]

Notes

For cases on appeal against award made, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 604–605.

For cases on issue not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6485–6494.

Cases referred to

Amat bin Majid v Azmi b Kamat & Anor [2009] 1 PIR 23 (refd)
Arina Bt Ujang v Susof B Nordin & 3 Ors [2009] 2 PIR 44 (refd)
Baharuddin bin Sulong & Anor v Hiew Ching Choo [2008] 1 PIR 40, sc (refd)
Che Hanif bin Che Soh v Alamgiran Bhuyan bin Siraj Uddin Miah [2008] 1 PIR 2, sc (refd)
Huang Chin Yeh v Chuo Chong Teck [2008] 1 PIR [63], sc (refd)
Kedaya ak Jantong v Chung Lang Hiong & Anor [2009] 2 PIR 36 (refd)
Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99, SC (refd)
Mohd Al Mu'min bin Shamsudin v Selamah bt Jamal & Anor [2008] 2 PIR 9, sc (refd)
Mohd Fayzul bin Ahmad & 2 Ors v Ismail bin Hamid & Anor [2008] 2 PIR 60, SC (refd)
Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30; [1984] 1 CLJ (Rep) 294, FC (refd)
Perumal a/l Sendra Yakaundan v Kalasom bt Arshad & Anor [2008] 1 PIR 22, sc (refd)
Sevaji a/l Vythee & Anor v Liew Leong Heng & Anor [2009] 2 PIR 62 (refd)
Tan Kok Yu v Edris Bin Adis [2008] 2 PIR 55, sc (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] CLJ (Rep) 323, sc (refd)
Teo Pek Ngee v Said b Muda & Anor [2010] 1 PIR 40 (refd)
Tineshkumar a/l Abi Manyyu & Anor v Che Daud bin Mohd Roki & Anor [2007] 1 PIR 80, sc (refd)
Voo Jan Choo v Lee Chie Siang & Anor [2007] 9 CLJ 242, HC (refd)

Allan Lao (David Allan Sagah & Teng Advocates) for the appellants.
Joseph Baling (Khaira & Co) for the respondent.

Sangau Gunting J:

[1] The learned sessions judge had on 21 July 2010 entered judgment for the respondent in the sum on RM207,498. That sum consists of general damages (RM182,000) and special damages (RM25,498).

[2] The complaint of learned counsel for the appellants relates mainly to (a) the amount of general damages allowed by the sessions judge concerning (i) fracture of fifth to 12th ribs (eight ribs) — RM34,000, (ii) lung contusion — RM16,000, (iii) phenumohaemothorax — RM30,000, (iv) fractures at spine — RM100,000, as well as, his decision concerning the cost of nursing care in the sum of RM4,200 and the cost of future operation.

[3] According to the appellants' counsel, the award for each of the aforesaid items under (i), (ii), (iii) and (iv) should be respectively RM28,000, RM4,000, RM37,500 and RM35,000. And he contends the cost of nursing care in the sum of RM4,200 was not pleaded and must be dismissed. As regards the cost of future operation in the sum of RM20,000, he says although the amount is acceptable, it should not have been awarded as special damages and ought not attract interest.

[4] Citing *Perumal a/l Sendra Yakaundan v Kalasom bt Arshad & Anor* [2008] 1 PIR 22, *Teo Pek Ngee v Said b Muda & Anor* [2010] 1 PIR 40, and making reference to the compendium of personal injury awards as at 26 October 2010, concerning the eight ribs learned counsel for the appellant says 'a very reasonable award would be RM3,500.00 per rib, or RM28,000.00 for 8 ribs'.

[5] Learned counsel for the respondent points out, in arriving at the sum of RM34,000 ie RM4,250 per rib, the learned sessions judge had referred to *Tan Kok Yu v Edris Bin Adis* [2008] 2 PIR 55, *Mohd Al Mu'min bin Shamsudin v Selamah bt Jamal & Anor* [2008] 2 PIR 9, and *Perumal a/l Sendra Yakaundan v Kalasom bt Arshad & Anor*. The amount of award per rib given in each of these cases were respectively RM3,600, RM5,000 and RM1,818.18. It would be noted that averaging these three amounts would give a figure of about RM3,472.

[6] According to the respondent's counsel having suggested RM2,500 per rib in the in the sessions court, the appellant is now, at the appellate stage, suggesting RM3,500 per rib. The respondent's counsel then points out what he considers as 'the average award for fracture rib is RM5,000 in both East and West Malaysia …', citing in support *Kedaya ak Jantong v Chung Lang Hiong & Anor* [2009] 2 PIR 36 (RM5,000 per rib), *Amat bin Majid v Azmi b Kamat & Anor* [2009] 1 PIR 23 (RM5,000 per rib), and *Mohd Al Mu'min bin Shamsudin v Selamah bt Jamal & Anor* (RM5,000 per rib), as well as, to Practice Direction No 1/2010 dated 11 August 2010.

[7] Counsel further raises the point about the learned sessions judge's having taken into account overlapping by deducting 10% from the sum total awarded for fracture of the ribs, lung contusion and pneumohaemothorax. With respect, as regards the RM34,000 allowed in respect fracture of 5th to 12th ribs

(eight ribs), I do not see any substantial reason why it could be considered as excessive and therefore ought to be maintained.

[8] Referring to the aforesaid Practice Direction No 1/2010 the respondent's counsel contends the computation of general damages for personal injuries in Sabah and Sarawak 'should not be the same as that of West Malaysia'. In support he referred to a point presumably emphasised during a meeting between Yang Amat Arif the Chief Judge of Sabah and Sarawak, the plaintiffs' lawyers and insurance companies' lawyers, that Malaysian civil servants working in Sabah and Sarawak 'are paid 30% more than their colleagues in West Malaysia'.

[9] The appellant's counsel's interpretation of the aforesaid contention on the part of the respondent's counsel seems indicated in his submission in reply: 'In crude monetary terms, what is being indirectly said is that a Sarawakian lung is worth more than a Peninsular one'. Counsel suggests '… the said Practice Direction be interpreted to apply to specific damages instead as this falls in line with differing and unique geographical situation in Sarawak whereby road access is more arduous and cost of living higher …'.

[10] Learned counsel for the respondent appears not to have directly replied to the implied contention in these statements made by learned counsel for the appellants. Instead, he appears to have emphasised a point presumably gleaned from three cases reported in the PIR, that 'the average award for fracture rib is RM5,000 in both East and West Malaysia …'

[11] With respect, the appellants' counsel's remark '… what is being indirectly said is that a Sarawakian lung is worth more than a Peninsular one …' seems indicative of learned counsel not to have fully appreciated the fact that cost of living is generally higher in Sarawak, and for that matter in Sabah as well, compared to the cost of living in Peninsular Malaysia. It seems to me the point presumably emphasised during the said meeting between the CJSS and lawyers for the plaintiffs and insurance companies must in all probability relate substantially to the 'higher cost of living' factor.

[12] In other words, due to the higher cost of living in Sabah and Sarawak, a sum of general damages for say, lung contusion, awarded to a plaintiff in Peninsular Malaysia would have a higher purchasing power compared to an equal sum awarded to a plaintiff in Sarawak and Sabah, and therefore, for the higher cost of living factor to be accounted for, awarding an appropriate higher amount of general damages for similar injury to a plaintiff in Sabah and Sarawak ought to be considered. Otherwise, totally ignoring the 'higher cost of living' — factor, would translate the amount allowed to a plaintiff in Sabah and Sarawak being in reality significantly less although having precisely similar face

value. This is, of course, without prejudice to a thorough consideration of the overall relevant circumstances which invariably would differ from case to case.

[13] Focusing on the lung contusion the appellants' counsel says the RM16,000 — award is 'unwarranted'. Saying the lung was only bruised and 'not punctured and/or did not collapse', the amount according to counsel ought to be only RM14,000. It seems undisputed, however, the finding of fact made by the sessions judge presumably based on the evidence of the medical doctors Dr Siow Sze Li (PW4), that '… there is an injury to the lung causing air to leak from the lungs to the chest cavity of the Plaintiff (PW5)'. As pointed out by the respondent's counsel in arriving at RM16,000, the sessions judge appears to have referred to the case of *Mohd Fayzul bin Ahmad & 2 Ors v Ismail bin Hamid & Anor* [2008] 2 PIR 60 where RM16,000 was allowed for lung contusion. Except for expressing his view on the Practice Direction No 1/2010 which differs from the view of the respondent's counsel, thereafter it would appear the appellants' counsel did not make any specific reply to this aspect of the respondent's submission.

[14] It would appear, that having referred to the case of *Baharuddin bin Sulong & Anor v Hiew Ching Choo* [2008] 1 PIR 40, the learned sessions judge awarded RM30,000 to the plaintiff in respect of phenumohaemothorax, which, according to PW4, involves an 'injury to the lung causing the air to leak to the chest cavity'. Referring to the compendium of personal injury awards as at 26 October 2010, learned counsel for the appellants suggests a 'very reasonable' amount to be RM4,000 in respect of the lung contusion.

[15] Concerning phenumohaemothorax, having referred to said conpendium of personal injury the appellants' counsel suggests a 'more reasonable' award to be RM5,500. It is to be noted, that although the total of the said two amounts comes up to only RM9,500, learned counsel for the appellants contends 'the total amount to be awarded for the injuries sustained to the lungs and liver should be in the vicinity of not more than RM37,500. Having acceded to the RM10,000 — award concerning liver laceration, based on the amounts suggested by the appellants, the respondent's award in respect of injuries to the lungs and liver ought to be only RM19,500 (RM9,500 + RM10,000).

[16] However, learned counsel for the appellants nevertheless expressed the view, that the award for injuries to the lungs and liver 'should be in the vicinity of not more than RM37,500.00'. The total amount awarded in respect of the said injuries by the learned sessions judge is RM56,000 (RM16,000 + RM10,000 + RM30,000). With respect, it would appear as not having been shown, that in arriving at the aforesaid figures (RM16,000 + RM10,000 +

RM30,000) the learned sessions judge had acted upon wrong principle (see *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] CLJ (Rep) 323 (FC)). A

[17] Medical report, exh P2, describes the spine fracture as 'fracture lumbar spine with L5S1 spondylolisthesis'. Medical report, exh P3, describes the condition thus: 'Multiple levels of transverse process fracture at L2 and L3 (right side) and spious process fracture at L1 and L2. Spondylolisthesis (Grade 1) of L5/S1 with pars intercularis fracture'. In respect of this spine fracture, the learned sessions judge awarded RM100,000. B

[18] The RM100,000 — award appears to have been made after considering the evidence of the medical specialists concerning the nature of the injury sustained and its consequences to the plaintiff in terms of pain, disabilities and the surgery required. He appears to have also considered the past awards in similar cases ie *Arina Bt Ujang v Susof B Nordin & 3 Ors* [2009] 2 PIR 44, *Huang Chin Yeh v Chuo Chong Teck* [2008] 1 PIR 63, and *Sevaji a/l Vythee & Anor v Liew Leong Heng & Anor* [2009] 2 PIR 62. C D

[19] Citing *Tineshkumar a/l Abi Manyyu & Anor v Che Daud bin Mohd Roki & Anor* [2007] 1 PIR 80, *Che Hanif bin Che Soh v Alamgiran Bhuyan bin Siraj Uddin Miah* [2008] 1 PIR 2 and the compendium, the appellants' counsel contends: 'Since the present case involves fractures of the 4 vertebrae with spondylolisthesis, a more reasonable award would be RM35,000.00'. E

[20] The respondent's counsel points out that 'cases and figure referred to by the appellants … i.e. *Tineshkumar A/L Abi Manyyu & Anor v Che Daud B Mohd Roki & Anor* … and the compendium only referred to award for injuries and did not take into account the disabilities as a result of the disabilities'. In his final reply, learned counsel for the appellants quoted portions of the judgment of the sessions judge, 'Upon looking at the injuries suffered …and needs surgery to address the spine problem', and contends: '… the consideration for the cost of operation on the spine was included in the assessment which awarded sum of RM100,000'. And counsel says 'As it has been agreed that the said sum should be moved under special damages …claiming RM100,000 in this instance would be a direct and complete overlap which cannot be allowed'. Counsel then contends, 'In any event, the respondent should be able to claim at most RM80,000 for the spinal injury'. F G H

[21] The appellants' counsel also contends, that the respondent's injuries are not as severe as that of Mr Huang in the cited case of *Huang Chin Yeh v Chuo Chong Teck* [2008] 1 PIR 63. He says 'Mr. Huang's injuries have left him virtually unable to conduct daily activities without the constant aid and support of another person. The same cannot be said of the respondent'. Counsel contends 'the award for spinal injury should be no more than I

RM40,000. It may be noted here that earlier on counsel has contended 'In any event, the respondent should be able to claim at most RM80,000 for the spinal injury'.

[22] During the proceeding on 14 March 2011, in reply to the court's question as to why in the appellant's submission dated 6 January 2011 the appellant appears have contemplated of two maximum quantum ie RM40,000 and RM80,000 for the fracture of the spine, the appellant's advocate told the court, 'The RM80,000 in paragraph 16 (of the said submission) should be RM40,000'. He says it is a typographical error pointing out the fact the figure RM40,000 is repeated in para 33 of the said submission.

[23] The respondent's advocate objected to the appellant's 11th hour request for the substitution of RM40,000 for what he says has been 'clearly stated in the submission …'. Having considered the parties' arguments in the context of the appellant's submission, not only in para 16 but also in paras 17–19, I found it difficult to accede to the request to delete RM80,000 and substitute the figure RM40,000. It may be noted, that in comparing *Huang Chin Yeh's* injuries in *Huang Chin Yeh*'s case where the award concerning cervical spinal injury was RM100,000 and the respondent's injuries, the plaintiff's advocate observed, '… the result of the respondent's injuries are not as severe as that of Mr. Huang'.

[24] Having earlier said 'the respondent should be able to claim at most, RM80,000.00 for the spinal injury', and keeping in mind counsel's reference to the case of *Huang Chin Yeh*'s case where the award for cervical spinal injury was RM100,000, learned counsel's subsequent view, that 'the award for spinal injury should be no more than RM40,000' does seem to be a severely disproportionate reflection of counsel's view of the difference in severity. That is, 'not as severe as' seems to have justified the reduction of some 60% instead of just 20% from the award in *Huang Chin Yen*'s case.

[25] In any case, in the circumstances of this case, in having reached the quantum of general damages at RM100,000 for the injuries described by the general surgeon as 'Multiple levels of transverse process fracture at L2 and L3 (right side) and spinous process fracture at L1 and L2. Spondylolisthesis (Grade 1) of L5/S1 with pars intercularis fracture' (exh P3), with respect, I do not think it could be concluded, that the learned sessions judge had acted upon wrong principle, and that his estimate of the aforesaid amount is erroneous (see *Tan Kuan Yau v Suhindrimani*).

[26] The appellants complain that the claim for costs of nursing was not pleaded. The respondent's counsel points out the appellants' failure to object to the testimony of the relevant witness ('PW2') during the trial. The respondent maintains the appellants were not taken by surprise by PW2's testimony. The

respondent's counsel says the appellants 'has (sic) waived their rights to object to the award of nursing care … (and) … ought to be maintained'. A

[27] In addition to the non pleading point, the appellants' counsel also contends the relevant testimony of the plaintiff's witness (PW2) 'was not corroborated with requisite documentary proof'. In this connection, counsel says, '… the appellants need not object to testimony of witnesses so long as the claims therein, if not previously pleaded, are not awarded. As such, the appellant has in no way, waived its right to object to the award'. B

[28] It seems the learned sessions judge did not address the defendants'/appellants' complaint, that the plaintiff's/respondent's claim for costs of nursing care is not pleaded and so must be dismissed. In allowing the said claim, albeit, at an amount lower that originally claimed, the sessions judge cited in support *Marappan & Anor v Siti Rahmah Bte Ibrahim* [1990] 1 MLJ 99 (SC) and *Voo Jan Choo v Lee Chie Siang & Anor* [2007] 9 CLJ 242. *Marappan & Anor v Siti Rahmah Bt Ibrahim* seems to contemplate on, inter alia, the justifiability or otherwise of care and nursing item. C D

[29] In *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30; [1984] 1 CLJ (Rep) 294 (FC), it was, inter alia, stated: E

> General damages refer to the damage which the law 'implies in wrongs actionable per se' and is averred in general terms in the pleadings without the necessity of quantifying the amount. They include future loss of earnings as well as damages for pain and suffering and loss of amenities. They relate to items of damage whether pecuniary of non-pecuniary. Special damages on the other hand have to be specifically pleaded and strictly proved. They refer to past expenses and loss of earnings. The exact loss must be pleaded where the precise amount of item has become clear before the trial. Loss of future earnings or post-trial loss differs from pre-trial loss which comes under special damages. The reason that special damages have to be specifically pleaded is in order to comply with its object which is to crystallise the issue and to put the defendants on their guard and tell them what they have to meet when the case comes on trial. F G

[30] In the said passage quoted from *Ngooi Ku Siong & Anor v Aidi Abdullah* the Federal Court appears to be enunciating the general principle, that special damages have to be specifically pleaded. In contradistinction, *Marappan & Anor v Siti Rahmah Bte Ibrahim* seems specific in its reference to the justifiability issue. This seems to have prompted the respondent's counsel to submit, '… the plaintiff's claim for cost of nursing care is justified by reason of the injury suffered by him'. In other words, if the very nature of the injury suffered by a plaintiff makes the necessity of care and nursing an irresistible inference, then it must follow as justifiable the corresponding claim for the cost thereof. H I

[31] In the instant case, the respondent's non compliance with the necessity to specifically plead his claim for cost of care and nursing did not appear to have prompted the appellants/defendants to raise the relevant objection. In fact, the defendants/appellants proceeded to cross-examine the relevant witness (PW2) on her testimony of her having taken care of her father (the plaintiff) presumably while he was bed ridden. In the circumstances, on balance of probability, it would appear justified to conclude that the defendants/appellants have waived their rights to object to the award of care and nursing. Anyway, based on the testimony of PW2, the claim for the cost thereof also appears to have been justified. In the circumstances of this case, the amount awarded for cost of care and nursing is therefore to be maintained.

[32] The appellants say the cost of future operation the RM20,000 — award should not have been awarded as special damages as the event and/or sum has yet to happen or has yet to be incurred, and ought not attract interest. The respondent's counsel appears to have conceded to this contention, and the appeal was therefore allowed in that the cost of future operation should be placed under general damages. For all the reasons adumbrated hereinbefore, the appeal concerning (a) the amount of general damages pertaining to (i) fracture of fifth to 12th ribs (eight ribs) —RM34,000, (ii) lung contusion — RM16,000, (iii) phenumohaemothorax — RM30,000, (iv) fracture at spine — RM100,000 and (b) the cost of nursing care in the sum of RM4,200 was dismissed.

Appeal dismissed.

Reported by Kohila Nesan